No. [redacted]144

IN THE

Supreme Court of the United States

October Term, 1960

STATE BOARD OF INSURANCE, ET AL., *Petitioners*

v.

TODD SHIPYARDS CORPORATION, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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SUBJECT INDEX

LIST OF AUTHORITIES

No. 1030

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To the Supreme Court of the United States:

STATEMENT OF THE CASE

Petitioners' statement is substantially correct, but it does not fully present the controlling facts, and therefore, Respondent submits its supplemental "Statement of the Case".

1.

THE UNADMITTED INSURANCE TAX IS AN OCCUPATION TAX AND NOT A REGULATION

After the enactment of the tax in 1957, the Texas State Board of Insurance and the Texas Comptroller of Public Accounts administratively determined that the unadmitted

insurance tax is an occupation tax (See State Board of Insurance Annual Reports for 1957, 1958 and 1959, S.F. p. 8, Pl. Ex. 4; S.F. p. 10, Pl. Ex. 5; S.F. p. 11, Pl. Ex. 6; S.F. pp. 11 and 12, S.F. pp. 19-24; See also the Factual Stipulation, Pl. Ex. 1, S.F. p. 2).

The Comptroller of Public Accounts has set aside one-fourth of the tax to the public free school fund as required of all "occupation taxes" by Texas Constitution Article VII, Section 3. This was done solely because the Comptroller classified the unadmitted insurance tax as an occupation tax (S.F. p. 26).

Although, at the time of the trial, Petitioners argued that the tax was a regulation and not an "occupation tax", the Comptroller was continuing to disburse the tax as an "occupation tax". Since the Comptroller has always classified the tax as an occupation tax, the Respondent's current argument that the tax is not really an occupation tax is without force.

Moreover, in the statute the Legislature expressly declared its purpose in Sec. 7:

> "Sec. 7. The fact that the present laws relating to the placement of surplus lines of insurance do not provide adequately for the conditions under which it shall be placed with the unauthorized insurers in a manner which *will insure the collection* of the tax levied upon the premiums charged or paid for such insurance . . ." (Sec. 7 of Chap. 395, Laws of 55th Regular Session) (Emphasis added)

In the light of this avowed declaration of intention to insure collection of the tax, i.e., the collection of the tax theretofore levied in Article 21.38 (2) (d) *(Texas Insurance Code)* and thereupon levied in Article 21.38 (2)

(e), Petitioners' argument of a different intention is untenable. The 1957 amendment simply eliminated the only possibility—paying premiums directly to "unauthorized insurers"—for avoiding the discriminatory five per cent (5%) tax.

The legislative purpose—to tax and to collect the tax—was carried into effect by the Comptroller's construction.

Petitioners' attempt to renounce the Legislature's avowed tax purpose is an untimely afterthought induced by this case.

Respondent's argument that the tax was part of a regulatory scheme to protect Petitioner from its own credulity in buying from "unadmitted insurers" is thoroughly squelched by the testimony of the Texas Commissioner of Insurance (S.F. p. 19):

> "Q. Do you do anything to try to regulate where or from whom Todd Shipyards buys its insurance?
> A. No, sir."

Even though the State Court did not specifically hold the unadmitted insurance tax to be a "Tax" rather than a "Regulation", if such a holding is necessary to support the judgment, it must be implied.

2.

THE UNADMITTED INSURANCE TAX DISCRIMINATES AGAINST UNADMITTED INSURERS

This tax on Petitioner's premium payments in New York to "unadmitted insurers" is at the rate of five per cent (5%). The tax on similar premiums paid to "admitted insurers" is levied at rates from 3.85% to a minimum of

1.1% (Article 21.38, *Texas Insurance Code*, and Article 7064 of *Texas Revised Civil Statutes)* (Stipulation—Pl. Ex. 1, page 3, S.F. p. 2; see also Court of Civil Appeals Opinion, 340 S.W. 2d 339, 342).

Since premiums paid to unadmitted insurers are taxed at the rate of five per cent (5%) and premiums paid to admitted insurers are taxed at smaller rates—varying from 3.85% to a minimum of 1.1%—the tax deliberately discriminates against the placing of insurance with unadmitted insurers and in favor of Texas insurers.

The tax is plainly discriminatory and deliberately favors "admitted" insurers.

3.

THE UNADMITTED INSURANCE TAX IS NOT CONFINED TO PAYMENTS BY TEXAS RESIDENTS

The plain language of Article 21.38 (2) (e) levies the tax not on Texas residents, but on "any person, firm, association or corporation" purchasing insurance from an unadmitted insurer covering Texas risks other than through a licensed agent. *Nowhere in the Statute are non-residents insuring Texas risks exempted from the tax.* The word "resident" does not appear in Article 21.38 (2) (e).

4.

RESPONDENT'S DOMICILE IS NEW YORK STATE

The Petition (p. 10) states, "Respondent is a Texas resident".

Respondent does not know in what sense "resident" is used by Petitioner, but the factual stipulation (Pl. Ex. 1,

S.F. p. 3) clearly established Respondent's domicile in New York:

> "Todd Shipyards has its principal office, principal place of business and domicile in New York City, New York. . . ."

Respondent is a resident of Texas only in the sense that each foreign corporation having a place of business and a permit to do business in Texas is a Texas resident.

5.

RESPONDENT HAS PAID ALL TAXES REQUIRED FOR THE PRIVILEGE OF DOING BUSINESS IN TEXAS

Since 1934 Respondent has duly maintained its permit to do business and has duly paid all taxes, fees and charges levied against Respondent for the privilege of doing business in Texas. (Factual Stipulations, Pl. Ex. 1, p. 3, S.F. p. 2).

QUESTIONS PRESENTED

(1)

Does the Court have jurisdiction when (1) the Texas Supreme Court may have rested its judgment upon an adequate state ground, and (2) the Petitioner, State Board of Insurance, et al., was not the Petitioner in the Application for Writ of Error filed in the Texas Supreme Court?

(2)

Is the Texas Unadmitted Insurance Tax levied on Respondent's New York contracts and premium payments unconstitutional under the Due Process clause of the U. S.

Constitution's Fourteenth Amendment as held by the Texas Courts on the authority of *St. Louis Cotton Compress Co. v. State of Arkansas*, 260 U.S. 346? Since Petitioner does not distinguish *St. Louis Compress*, the question simply becomes, "Should *St. Louis Cotton Compress* be overruled?"

(3)

Is the arbitrary discrimination against unadmitted insurers and in favor of Texas insurers embodied in the Texas Unadmitted Insurance Tax unconstitutional under the Equal Protection Clause of the U. S. Constitution's Fourteenth Amendment?

ARGUMENT

(1)

THE JURISDICTION QUESTION

The Petitioner's Application for Writ of Error in the Texas Supreme Court assigned, among others, the following errors:

POINT II.

> The Court of Civil Appeals Erred in Holding that Article 21.38, Section 2, Subsection (e) of the Texas Insurance Code is Unconstitutional as a Violation of Due Process, Section 19, Article I of the Texas Constitution.

POINT IV.

> The Court of Civil Appeals Erred in Failing to Pass on and in Failing to Hold that Article 21.38, Section 2, Subsection (e) of the Texas Insurance Code is Constitutional and Not a Violation of the Equality and Uniformity Clauses of the Texas Constitution, Section 1 and 2, Article VIII.

The Trial Court judgment did not specify the grounds of unconstitutionality supporting the judgment. The Court of Civil Appeals (340 S.W. 2d 339, 342) recognized the grounds to be:

> "It is the contention of appellee that Sec. 2 (c), Art. 21.38, supra, is violative of the "due process" clauses of the Constitutions of the United States and Texas (Sec. 1, 14th Amendment, Art. 1, Sec. 19, respectively, Vernon's Ann. St.) and of the "equality and uniformity" clause of the Texas Constitution (Secs. 1 and 2, Art. 8), and the equal protection clause of the United States Constitution (Sec. 1, 14th Amendment)."

Although the Texas Supreme Court stated in a per curiam opinion that the case was controlled by *St. Louis Cotton Compress*, 260 U.S. 346, the court, nevertheless, refused the writ with the notation "No Reversible Error". 343 S.W. 2d 241.

The refusal with the notation "No Reversible Error" means the Supreme Court recognizes that the Court of Civil Appeals has reached a correct result, but the Supreme Court does not necessarily approve the principle of law upon which the decision was based. (The Federal Due Process Point) *Texas Rules of Civil Procedure* No. 483, *Texas Osage Cooperative v. Van Clark*, —Tex.—, 322 S.W. 2d 506. Therefore, the highest Texas Court did not expressly approve the basis of decision in the Court of Civil Appeals and deliberately refused to limit the ground for the writ refusal to the Federal questions.

On the other hand, an "unqualified" refusal of the writ would have approved the holding and opinion of the Court of Civil Appeals as a correct statement of the law and con-

trolling principles *T. R. C. P.* No. 483, *Agnew v. Coleman County Elec. Coop.*, 153 Tex. 587, 272 S.W. 2d 377. Since the writ refusal was not "unqualified", the Court of Civil Appeals opinion does not establish the grounds for the state judgment.

Petitioner's Point II in the Texas Supreme Court assigned as error the holding that the statute was unconstitutional under the Texas due process clause, and Point IV assigned as error the failure to hold the statute was not unconstitutional under the Texas Uniformity and Equality Clauses.

Petitioner's Point II admits the Court of Civil Appeals and the Trial Court holding is grounded on an adequate state ground, to-wit: Texas Due Process. Since the judgments in the appellate court simply affirm the trial court judgment which may have been based on adequate state grounds, the refusal of the Writ in the Texas Supreme Court may have also been on this adequate state ground.

Petitioner also admits the Texas and U. S. due process clauses are coextensive in the Application for Writ of Error:

> "The Petitioner's first two points of error will be discussed here because. fundamentally, the same issues are involved. In this connection, it is observed that it has been held that Article I, Section 19 of the Texas Constitution restricts the powers of the Legislature to the same extent as the due process clause of Section 1 of the 14th Amendment of the United States Constitution. *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249."

After admitting that the Texas and Federal Due Process clauses are coextensive, Petitioner could not now, in good grace, deny the Texas Courts may have also held that Texas due process also condemns the tax.

The refusal with the notation "No Reversible Error" does not disclose the basis for refusal and does not negative the two adequate state grounds, but the notation deliberately announces the lower court opinion is not approved nor adopted. Thus, the refusal may have been based on an adequate state ground, to-wit: (1) The Texas Due Process Clause or the Texas Equality and Uniformity Clauses.

The controlling jurisdictional principle is now well settled by *Durley v. Mayo*, 351 U.S. 277, as follows:

> "It is a well established principle of this Court that before we will review a decision of a state court it must *affirmatively appear* from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the case . . . And where the decision of the state court *might* have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it." (Emphasis added)

Since the Texas Supreme Court rendered no complete opinion and its judgment (Refusal of the Writ with the notation "No Reversible Error") *MIGHT* have also rested on the Texas Constitution's Due Process and Equality and Uniformity Clauses, this court should not take jurisdiction.

In *Stembridge v. Georgia*, 343 U.S. 541, the rule is stated:

> "We are without jurisdiction when the question of the existence of an adequate state ground is debatable."

Since (1) Petitioners assigned as error in the Texas Application for Writ an adverse holding on the Texas Due

Process and Equality and Uniformity points, (2) The Texas Supreme Court carefully avoided limiting itself to one ground for refusal by the notation "No Reversible Error", and thereby also deliberately declined to limit itself to the grounds announced by the Court of Civil Appeals for affirmance, and (3) the affirmed Trial Court judgment does not specify a state or federal ground, the existence of an adequate state ground is clearly debatable.

Therefore, the record does not affirmatively demonstrate that the Federal Due Process question was necessary to a determination of the case. The Texas decision may have been grounded on the Texas Due Process and Equality points, either of which is sufficient to sustain the judgment.

The "State of Texas" rather than the State Board of Insurance, et al., was the Petitioner in the Texas Supreme Court, and State of Texas is apparently not a Petitioner in this court. The State of Texas is also a stranger to the judgment. (Petitioners' Appendix B-1). For these additional reasons, (1) an indispensable Petitioner has not joined in this Petition, and (2) a stranger to the judgment was the Petitioner in the Texas Supreme Court, jurisdiction should be declined.

(2)

THE FEDERAL DUE PROCESS QUESTION

(A)

St. Louis Cotton Compress Co., 260 U.S. 346 *controls this case.*

As stated in the lower court opinions, 340 S.W. 2d 339, and 343 S.W. 2d 241, *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, is indistinguishable and clearly condemns the Texas Unadmitted Insurance Tax.

Petitioner concedes that *St. Louis Cotton Compress Co.* controls, but, without ever clearly saying so, petitions the court to overrule *St. Louis Cotton Compress Co.*

Petitioner's argument that *St. Louis Cotton Compress Co.* is stale and "discarded" (Petition, page 13) is refuted by the recognition of its authority as late as *F. T. C. v. Travelers H. A.*, 362 U.S. 293, citing the 1945 Congressional Report on the McCarran-Ferguson Act.

> "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the states, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer v. Louisiana* (165 U.S. 578), *St. Louis Cotton Compress Co. v. Arkansas* (260 U.S. 346) and *Connecticut General Life Insurance Co. v. Johnson* (303 U.S. 77), which hold, inter alia, *that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.*" (H.R. Rep. No. 143, 79th Congress, 1st Sess. 3) (Emphasis added)

When enacting the McCarran-Ferguson Act, the Congress clearly intended that Texas would have no power to tax Respondent's New York premium payments.

Petitioner suggests the entire scheme of insurance regulation be changed by overruling *St. Louis Cotton Compress Co.* so as to expand Texas power to New York insurance

contracts and premium payments. This will frustrate the congressional intention in enacting the McCarran-Ferguson Act and will disrupt the regulatory schemes of the fifty states.

In the cases that have distinguished *St. Louis Compress*, such as the *Osborn* (310 U.S. 53) and *Hoopeston* (318 U.S. 313) cases, *St. Louis Compress* has been distinguished on the ground that the regulated insurance company was "admitted" in the state and the activities regulated were *not* extraterritorial. The sound disinction between *regulation within the state* and *taxation without the state* in no way lessens the force of *St. Louis Compress* when applied to Respondent's premium payments outside Texas.

Connecticut General Life Insurance Co. v. Johnson, 303 U.S. 77, condemns, as a due process violation, a California tax on reinsurance premiums paid to a Connecticut corporation admitted in California on contracts of reinsurance made in Connecticut with this statement:

> "Appellant, by its reinsurance contracts, undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transaction or relationship between appellant and those originally insured, and called for no action in California . . . apart from the facts that appellant was privileged *to do business in California*, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or in the reinsurance contracts. *No act in the course of their formation, performance, or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection.*
>
> ". . . All that appellant did in effecting the reinsurance was done without the state *and for its transac-*

> *tion no privilege or license by California was needful.* The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the State." (Emphasis added)

The *Johnson* case squarely condemns an extra-territorial tax substantially similar to the unadmitted insurance tax, even though the risks were located in the taxing state and the insurer had a permit in the taxing jurisdiction. Respondent's insurers have no Texas permit.

(B)

OSBORN AND HOOPESTON CANNING COMPANY DO NOT SUPPORT PETITIONERS' POSITION

Petitioner's statement (Petition page 5) that *Osborn v. Ozlin*, 310 U.S. 53, *Hoopeston v. Cullen*, 318 U.S. 313, and *Travelers Health Association v. Virginia*, 339 U.S. 643, conflict "in principle" with *St. Louis Cotton Compress Company* is not justified.

In *Osborn v. Ozlin*, the statute provided that no insurance on Virginia property should be issued by an admitted insurer unless countersigned by a resident agent who was forbidden to share more than 50% of his commission with non-resident brokers, and the Court held that since (1) the statute was applicable only to admitted insurance companies, and (2) the statute was not aimed at taxing or prohibiting contracts beyond Virginia's borders, the insurance company was not denied due process, because Virginia had jurisdiction to regulate the Virginia activities of an admitted insurer. *Osborn v. Ozlin* specifically distinguished *St. Louis Compress Co.*, the *Tabacos* and *Allgeyer* cases on the basis that the statutes in *Allgeyer*, *St. Louis Compress* and *Tabacos* (1) were not directed at

the regulation of insurance within the state, but to the making of contracts outside the state, and (2) *The St. Louis Compress* tax did not tax an insurer having a permit in the taxing jurisdiction.

Since (1) the unadmitted insurance tax is identical to the Arkansas tax condemned in *St. Louis Compress*, and (2) *Osborn v. Ozlin* expressly distinguishes *St. Louis Compress*, the *Osborn* case is not in point.

Moreover, *Osborn v. Ozlin* does not uphold any tax and makes no comment on the State's power to tax premium payments in another state.

Petitioner also relies on *Hoopeston Canning Co. v. Cullen*, supra, upholding New York's right to regulate an insurance company *licensed and doing business in New York*. The *Allgeyer* case is distinguished in *Hoopeston Canning Co.* and therefore, the *Hoopeston* case is no authority supporting the State's power to tax Respondent. *St. Louis Compress* is not mentioned.

Hoopeston makes no holding nor comment on the State's power to tax premium payments in another State.

Travelers Health Association v. Virginia, supra, (1) is not a tax case, (2) does not overrule *St. Louis Compress Co.*, (3) upholds state regulation of insurance transactions within the state, (4) upholds substituted service, and (5) holds nothing on extra-territorial transactions. *Travelers Health Association* is not in point.

(C)

ST. LOUIS COTTON COMPRESS CO. ESTABLISHES A SOUND PUBLIC POLICY

St. Louis Cotton Compress's policy of *preventing a State from favoring its own* and from taxing transactions in another state is sound.

Since the Congress relied on *St. Louis Cotton Compress Co.* in passing the McCarran-Ferguson Act, its departure would frustrate the congressional purpose, the State-Federal regulatory jurisdiction contemplated by the Act, and the current regulatory schemes throughout the fifty states. For instance, Texas could immediately tax the reinsurance contracts protected by *Connecticut General Life Insurance Co. v. Johnson.*

If New York and Texas are permitted to tax the same premium payments, there will inevitably result an unseemly race among the states to gain new tax sources by taxing extra-territorial transactions.

If Texas is allowed to tax New York premium payments, the State's taxing power is released to roam "unconfined and vagrant" on transactions in other states. This will not do, if "due process" and the Federal system are to survive. See Concurring Opinion in *Allied Stores v. Bowers,* 358 U.S. 522.

Since its historic revenue sources are inadequate, the Texas Legislature is now seeking to tax interstate commerce and extra-territorial transactions. This is evidenced by the recent condemnation of such taxes in this case, the gas gathering tax and the so-called severance benficiary tax case. Overruling *St. Louis Cotton Compress* will invite the Texas Legislature to tax other extra-territorial transactions.

St. Louis Compress Co. v. State of Arkansas, establishes a sound policy, to-wit:

> "It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside. . . ."

In a federal system, the wisdom of this policy is beyond question, and the policy may not be lightly cast aside.

Respondent submits that *St. Louis Compress* should not be overruled; the overruling of *St. Louis Compress* would frustrate the intent of the *McCarran-Ferguson Act* by greatly expanding state power to include the taxation of extra-territorial insurance transactions.

3.

THE FEDERAL EQUAL PROTECTION QUESTION

(A)

"EQUAL PROTECTION" CONDEMNS THE STATE'S ATTEMPT TO FAVOR DOMESTIC INSURERS AND DISCRIMINATE AGAINST FOREIGN INSURERS.

The deliberate discrimination embodied in the tax is in favor of premiums paid to admitted insurers (1.1% to 3.85% rate) and against premiums paid to unadmitted insurers (5% rate). (See Stipulation, Pl. Ex. No. 1, S.F., p. 2; C.C.A. Opinion, 340 S.W. 2d 339, 342.)

The unconstitutionality of a discrimination favoring domestic over foreign insurers has been well established since *Hanover Fire Insurance Company v. Carr*, 272 U.S. 494, invalidating under the equal protection clause, an Illinois net receipts tax levied on foreign corporations but exempting domestic corporations. The Court wrote at page 516:

> "But an occupation tax imposed upon 100 percent of the net receipts of foreign insurance companies admitted to do business in Illinois *is a heavy discrimination in favor of domestic insurance companies of the same class and in the same business* which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 60 per cent of the full value of the property. It is a de-

> nial of the equal protection of the laws." (Emphasis added)

Hanover Fire Insurance Company teaches that "Equal Protection" prevents the state from imposing taxes that favor domestic insurers and discriminate against foreign insurers.

The United States Supreme Court has uniformly condemned as constitutionally "unequal" all attempts by the States to favor transactions with *residents* and to discriminate against transactions with *non-residents.* The leading case is *Wheeling Steel Corporation v. Glander,* 337 U.S. 562, holding a tax on intangibles of a foreign corporation, although exempting identical intangibles of residents, is an unconstitutional classification. *Glander* plainly declares that state taxation may not establish classifications to *favor residents* and to *discriminate against non-residents.*

The Court said:

> "It seems obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but *solely because of the different residence of the owner.*" (Emphasis added)

Respondent is not accorded equal treatment and the inequality is not because of the slightest difference in Texas' relation to the premium payment, but the inequality is solely because of paying premiums to "unadmitted" insurers. The inequality deliberately favors Texas insurers and deliberately discriminates against New York and London insurers.

Glander teaches that (1) a state tax must equally apply to its residents and a foreign corporation, and (2)

"Equal Protection" denies the states the right to favor their residents over non-residents. The Texas unadmitted insurance tax does not apply equally to admitted (residents) and unadmitted insurers (non-residents) and falls within the specific condemnation of *Glander.*

A more recent case, *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, upheld an Ohio tax favoring property of non-residents and discriminating against property of residents. Yet, the concurring opinion carefully preserves Glander's authority and declares that any State attempt to favor residents is "mechanically" condemned by the Fourteenth Amendment, i.e., discrimination in favor of residents is unlawful per se, because of the nature of our Federal system. The court wrote:

> ". . . There is, therefore, no reason to judge the state action mechanically by the same principles as state efforts to favor resident. . . ."

The Texas unadmitted insurance tax may be condemned "mechanically", because it is a clear effort to favor residents and "those paying tribute to the state".

Although the Court has approved many different schemes of classification and has approved a classification favoring nonresidents over residents, *Allied Stores of Ohio v. Bowers,* supra, the Court has uniformly condemned all attempts by states to levy taxes discriminating in favor of domestic corporations and discriminating against foreign corporations.

The point Respondent makes is that equal protection prevents Texas from selecting a class for taxation so as to favor domestic insurers and to discriminate against foreign insurers. To state the point in yet another way, a classification of admitted and unadmitted insurers so as to favor

the admitted insurers is an arbitrary and unconstitutionally unequal classification.

It is true that the unadmitted insurance tax accomplishes its intended discrimination by distinguishing between "admitted" and "unadmitted" insurers and does not expressly base the discrimination on residence and nonresidence or on domestic and foreign insurers. However, Respondent submits that there is no distinction between the unadmitted insurance tax's classification of "admitted and unadmitted insurers" and the classification of domestic and foreign insurers in *Hanover Fire Insurance Co.* The State's effort to favor admitted insurers and discriminate against unadmitted insurers is identical to and has the same vices as the State's efforts to favor domestic over foreign insurers. Each of these discriminations permits the State to favor its own, flies in the face of our Federal system and defies the limitations of "Equal Protection".

Respondent respectfully submits that the following classifications are constitutionally unequal:

(1) Domestic-Foreign Corporation classification favoring domestic corporation *(Hanover Fire, Glander)*

(2) Admitted-Unadmitted Insurance Company classification favoring admitted insurers, which is merely another way of saying domestic insurers—foreign insurers favoring domestic insurers.

(B)

THE EXEMPTION OF DOMESTIC INSURERS FROM THE TAX DENIES EQUAL PROTECTION

The Texas taxable event is the *payment of premiums* on Texas risks. All persons paying premiums on Texas risks to admitted insurers are exempt. The arbitrary exemption of payments to admitted insurers renders the tax uncon-

stitutionally unequal. This "no-exemption" principle was followed in *Morey v. Doud*, 354 U.S. 457, when an Illinois license and regulatory statute applying to firms "selling or issuing money orders"—but exempting the American Express Company—was condemned as a denial of "Equal Protection".

In other words, after Illinois decided to regulate the "Selling and issuing of money orders" all people so selling and issuing are required by "Equal Protection" to be treated equally.

The *Morey* principle requires that all persons "paying premiums on Texas risks" be taxed equally and condemns the attempted Texas exemption in favor of payments to domestic insurers.

In a nutshell, Respondent's equality arguments are two-pronged:

(a) First:—Although the State may classify taxable events (premium payments on Texas risks), the State may not classify the persons performing the taxable event ("persons paying to admitted or unadmitted insurers"). The attempted classification of persons renders the tax constitutionally unequal.

(b) Second:—Even though the State has the right to classify persons paying the taxed premiums, nevertheless, the attempted discriminatory classification in favor of payments to domestic (admitted insurers) and against foreign insurers (unadmitted insurers) is unreasonable so as to render the tax constitutionally unequal.

The distinction between (a) and (b) above is not always clearly drawn in the cases, yet Respondent submits that two "equality" questions are presented:

(1) The right to classify persons paying premiums on Texas risks, vel non, and

(2) The reasonableness of the classification—admitted and unadmitted insurers.

WHEREFORE, PREMISES CONSIDERED, Respondent prays the Petition for Certiorari be dismissed for want of jurisdiction and alternatively, (2) the Petition for Certiorari be denied, and (3) for such other and further relief and orders as may be appropriate in the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this Brief in Opposition to the Petition has been served pursuant to Supreme Court Rule No. 33 by depositing a copy of the Brief in a United States Mail Box, with first class postage prepaid, addressed to counsel of record for the Petitioner at his Post Office Address, Capitol Station, Austin 11, Texas.

FRANK A. LIDDELL